STATE OF MICHIGAN

COURT OF APPEALS

In re SETH RYAN WESTFIELD and JORY BRIAN WESTFIELD, Minors.

THOMAS SALMON and JOANN SALMON,

Petitioners-Appellants,

v

FAMILY INDEPENDENCE AGENCY,

Respondent-Appellee.

UNPUBLISHED
December 17, 1999

Nos. 218535; 218573
St. Joseph Circuit Court
Family Division
LC Nos. 98-000132 AD
98-000133 AD

Before: Hood, P.J., and Holbrook, Jr. and Fitzgerald, JJ.

PER CURIAM.

Petitioners, the maternal grandparents of Seth Ryan Westfield and Jory Brian Westfield, appeal as of right the circuit court opinion and order upholding the decision of the Michigan Children's Institute (MCI) to deny petitioners' request to adopt the children after the parental rights of the biological parents were terminated.[1] We affirm.

The parental rights of Seth and Jory's biological parents were terminated, and the children were permanently committed to the MCI, a child placing agency. Pursuant to §43(1)(b) of the Michigan Adoption Code, MCL 710.43(1)(b); MSA 27.3178(555.43)(1)(b), consent to adoption must be executed by the authorized representative of the MCI. William Johnson, superintendent of the MCI, denied petitioners' request for consent to adopt the children. Petitioners then brought the current action for a determination under MCL 710.45; MSA 27.3178(555.45) whether the withholding of consent to adopt was arbitrary and capricious.

Judicial review of the withholding of consent to an adoption is governed by §45. Under subsection 1, a person who has filed a petition to adopt may move in the court for a determination whether the withholding of consent to adopt is arbitrary and capricious. Under subsection 2, the court

may terminate the rights of the representative who must give consent and enter a final order of adoption if the court finds by clear and convincing evidence that the consent was withheld arbitrarily and capriciously. Petitioners contend that grandparents have a fundamental right to the custody of their grandchildren and, therefore, that the review afforded by § 45 violates due process.[2]

Petitioners rely on *Santosky v Kramer*, 455 US 745; 102 S Ct 1388; 71 L Ed 2d 599 (1982), to support their contention that they have a fundamental right to custody of their grandchildren. In *Santosky*, the Court considered procedures under New York state law that allowed termination of parental rights upon a finding by a "fair preponderance of the evidence" that the child was permanently neglected. In considering whether that burden of proof afforded parents due process, the Court recognized "that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." *Id.* at 753.

However, the *Santosky* decision concerned the "fundamental liberty interest of *natural parents* in the care, custody, and management of their child," *id.* at 754, not with the rights of natural grandparents. Petitioners make the extremely broad leap in logic that grandparents enjoy a fundamental right identical to that of a child's natural parents. While *Santosky* recognized a fundamental liberty interest in "matters of family life" generally, neither *Santosky* nor the authority cited therein supports the creation or recognition of a fundamental right on behalf of grandparents to custody or adoption of their grandchildren.

Indeed, precedent suggests that grandparents have no greater claim to custody than any other persons. In *Ruppell v Lesner*, 421 Mich 559, 566; 364 NW2d 665 (1984), which involved a custody dispute between a child's parents and grandparents, the Court stated that "except for limited visitation rights, grandparents have no greater claim to custody than any other relative, or indeed any other persons." *Id.* at 566. While custody may be awarded to grandparents according to the best interests of the child in an appropriate case, such an award of custody is based not on the grandparents' right to custody of the child, but on the court's determination of the child's best interests. *Id.* Accordingly, we reject petitioners' argument that they have a fundamental right to custody or adoption of their grandchildren, as well as their argument that they are entitled to the process due a natural parent.

Petitioners also argue that the Adoption Code unconstitutionally deprives them of due process of law because the only review provided by law is the circuit court's review of the MCI's decision under the "arbitrary and capricious" standard. They argue that additional protections are constitutionally required. We disagree. Because the scope of a circuit court's review of an administrative agency decision is specifically described in Const 1963, art 6, § 28, "that procedure is obviously not subject to constitutional challenge. There can be no due process violation where the constitution itself provides for the procedure to review administrative decisions." *Whispering Pines AFC Home, Inc v Treasury Dep't*, 212 Mich App 545, 553; 538 NW2d 452 (1995).

Last, petitioners argue that the circuit court abused its discretion by denying the relief requested. We disagree. The burden was on petitioners to show by clear and convincing evidence that Superintendent Johnson acted arbitrarily and capriciously in withholding consent.[3] The record reflects that there was an investigation of the situation and that Superintendent Johnson's decision to withhold

consent was based upon the results of that investigation and the recommendation of professionals and staff members involved. That being the case, it cannot be said that Superintendent Johnson acted arbitrarily and capriciously in withholding respondent's consent to the adoption. See, e.g., *People v Cotton*, 208 Mich App 180; 526 NW2d 601 (1994).

Affirmed.

/s/ Harold Hood
/s/ Donald E. Holbrook, Jr.
/s/ E. Thomas Fitzgerald

[1] Instead, the MCI approved a foster family's request to adopt the children.

[2] Although this argument was not raised below, this Court can review constitutional issues raised for the first time on appeal "when the alleged error could have been decisive of the outcome." *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994).

[3] It is important to remember that the scope of judicial review is not to determine whether Superintendent Johnson reached the "correct" decision. Rather, the limit of judicial review is to determine whether Superintendent Johnson acted arbitrarily and capriciously in reaching his decision.